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GEORGE C. LEWIS
3838 ANIMAS WAY
SUPERIOR CO 80027

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APR 27 2007

OFFICE OF PETITIONS
ON PETITION

In re Application of :
Lewis :
Application No. 10/769,020 :
Filed: January 29, 2004 :
Attorney Docket No. N/A :
For: TEST-CUTTING TARGET FOR :
EDGED-WEAPONS PRACTICE :

This is a decision on petition, filed January 8, 2007, requesting revival of the above-identified application.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any reconsideration petition must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137(a)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely submit corrected drawings in response to the Notice Regarding Drawings, mailed July 27, 2006, which set a non-extendable two month period for reply. Accordingly, the above-identified application became abandoned on September 28, 2006. A Notice of Abandonment was mailed on December 1, 2006.

Petitioner alleges that he did not receive the July 27, 2006 Notice and therefore, the delay in responding to it was unavoidable.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed.; (2) the petition fee as set forth in § 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this section.

This petition does not satisfy requirements (1) and (3).

With respect to (1), petitioner has not submitted a complete reply to the July 27, 2006 Notice. Since petitioner states that he did not receive the July 27, 2006 Notice, a copy is enclosed. The copy of the July 27, 2006 Notice should enable petitioner to craft a proper reply.

With respect to (3), the showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

The Director may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term 'unavoidable' "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

The showing required to establish non-receipt of an Office communication must include:

1. A statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.
2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.¹

A review of the record indicates no irregularity in the mailing of the July 27, 2006 Notice, and in the absence of any irregularity there is a strong presumption that the communication was properly mailed to the applicant at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communication was not in fact received.

The showing in the instant petition is not sufficient to withdraw the holding of abandonment because (1) applicant did not include a statement that a thorough and fruitless search of the file

¹ See notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

jacket and docket records was conducted and (2) applicant did not include a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.

Because petitioner is a *pro se* applicant, docketing practices such as those employed by registered practitioners may not be followed. Therefore, a somewhat modified approach to establishing non-receipt is reasonable.

Petitioner must state that the Office communication was not received and that he searched the place where he normally would keep such communications and couldn't find it. Petitioner must explain his system for keeping track of patent matters -- where he keeps the correspondence (Does petitioner have a file/ some means of organization where he keeps correspondence pertaining to this application?); where he writes down due dates (This need not be a log. This may be in the form of a calendar or a date book); how he knows replies are due; etc. In essence, Petitioner must explain how he reminds himself of response due dates and show that the due date for the non-final Office action was not entered into that system. The Office would like to see documentary evidence and records as may exist which would substantiate that Petitioner exercised due diligence with respect to his most important business.

ALTERNATIVE VENUE

If petitioner is unable to prove that he did not receive the July 27, 2006 Notice, petitioner should strongly consider filing a petition under 37 CFR 1.137(b).

Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an “unintentionally” abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was “unavoidable.” This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b).

A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m) (\$750.00); (3) a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and (4) any terminal disclaimer (and fee set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d).

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not

appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

A revival petition fee must be submitted with a revival petition, as the fee is a statutory requirement.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITION
Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

By hand: U.S. Patent and Trademark Office
Customer Service Window, Mail Stop Petition
Randolph Building
401 Dulany Street
Alexandria, VA 22314

By FAX: (571) 273-8300 – ATTN: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3230.



Shirene Willis Brantley
Senior Petitions Attorney
Office of Petitions

Enclosure: July 27, 2006 Notice Regarding Drawings and Notice of Draftsperson's Patent Review



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NUMBER 10/769020	FILING/RECEIPT DATE 01/29/2004	FIRST NAMES APPLICANT LEWIS, GEORGE C.	ATTORNEY DOCKET NUMBER 1
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GEORGE C. LEWIS
3838 ANIMAS WAY
SUPERIOR CO 80027

Examiner
GRAHAM, MARK

Art Unit Paper Number
3711

Date Mailed: 07-27-06

Notice Regarding Drawings

Corrected drawings for the above-identified application, received in the USPTO on 01/29/2004 are still not acceptable for the reason(s) identified on the attached PTO-948. Applicant is given one opportunity to correct the informalities within a two-month time period from the mailing date of this Notice. **THIS TIME PERIOD IS NOT EXTENDABLE UNDER EITHER 37 CFR 1.136(a) OR 1.136(b).** Failure to take corrective action within the set period will result in abandonment of the application.

ATTACHMENT: PTO-948 Notice of Draftsperson's Patent Review
Nhan Tang -703-305-0333 - Ext. 132

RETURN CORRECTED DRAWINGS TO:
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450